v.2792

# No. 13800

## United States Court of Appeals for the Ninth Circuit.

ROBERT DONALD ROWLAND,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

# Transcript of Record

**Appeal from the United States District Court for the Southern District of California Central Division.**

FILED
JUN - 3 1953
PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-29-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

WALTER S. BINNS,
United States Attorney;

RAY H. KINNISON, and
MANUEL L. REAL,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 22530-CD

September, 1952, Grand Jury

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT DONALD ROWLAND,

Defendant.

## INDICTMENT

[U.S.C., Title 50, App., Sec. 462—
Selective Service Act, 1948]

The grand jury charges:

Defendant Robert Donald Rowland, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 113, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to

report for induction into the armed forces of the United States of America on July 28, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ LAURENCE L. ROGERS,
Foreman.

/s/ WALTER S. BINNS,
United States Attorney.

ADM:AH.

[Endorsed]: Filed October 15, 1952. [2*]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 27, 1952

(Arraignment and Plea)

Present: The Hon. Wm. C. Mathes,
District Judge.

Proceedings:

Defendant is arraigned and pleads not guilty as charged in the Indictment.

It is Ordered that this cause is set for jury trial Nov. 24, 1952, 1:30 p.m.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

It Is Ordered that this cause is continued to Nov. 10, 1952, 11 a.m., for hearing on motion to dismiss.

EDMUND L. SMITH,
Clerk;

By /s/ S. W. STACEY,
Deputy Clerk. [3]

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[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant moves the indictment be dismissed on the ground the indictment is based on the Selective Service Act of 1948, whereas the offense, if any, was committed on July 28, 1952, a date more than one year after the adoption of Public Law 51, 87th Congress (Universal Military Training and Service Act), approved June 19, 1951.

Dated November 4, 1952.

ROBERT DONALD ROWLAND,

By /s/ EDWIN H. HIBER,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 6, 1952. [4]

[Title of District Court and Cause.]

## ORDER DENYING MOTION TO DISMISS

This matter came on for hearing on the 24th day of November, 1952, on Motion to Dismiss the Indictment herein, and the Court being fully advised in the matter,

It Is Ordered that said Motion to Dismiss the Indictment herein be, and the same is hereby denied, and

It Is Further Ordered that this case be, and the same is hereby continued for trial to December 1, 1952, at 1:30 p.m.

Dated November 24th, 1952.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed November 26, 1952. [6]

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[Title of District Court and Cause.]

## WAIVER OF TRIAL BY JURY AND WAIVER OF SPECIAL FINDINGS OF FACT

[Rule 23(a) and (c) F.R.C.P.]

The undersigned defendant hereby waives the right to a trial by jury and requests the court to try all charges against him in this cause without a jury.

The undersigned defendant further waives the right to request any special findings of fact as pro-

vided by Rule 23(c) of the Federal Rules of Criminal Procedure.

December 1, 1952.

/s/ ROBERT DONALD ROWLAND,
Defendant.

The undersigned counsel represents that prior to the signing of the foregoing waiver, the defendant above named was fully advised as to the rights of an accused under the Constitution and laws of the United States, including the right to a trial by jury and the right to request special findings in a case tried without a jury; and further represents that, in his opinion, the above waiver by the defendant of trial by jury and special findings is voluntarily and understandingly made.

December 1, 1952.

/s/ J. B. TIETZ,
Attorney for Defendant.

The United States Attorney hereby consents that the case be tried without a jury, and waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

December 1, 1952.

/s/ WALTER S. BINNS,
United States Attorney;

By /s/ MANUEL L. REAL,
Assistant U. S. Attorney.

December 1, 1952.

/s/ WM. C. MATHES,
United States District Judge.

[Form Cr. 23]
[Mathes, J.]

[Endorsed]: Filed December 1, 1952. [7]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—FEB. 9, 1953

Present: The Hon. Wm. C. Mathes,
District Judge.

Proceedings: For further proceedings on trial.

Attorney Tietz moves for a continuance. Said motion is denied.

Both sides rest. Counsel argue.

Court Finds defendant guilty as charged and orders cause referred to Prob. Officer for investigation and report and continued to Feb. 24, 1953, 10 a.m. for sentence; defendant to remain on present bond.

EDMUND L. SMITH,
Clerk;

By /s/ P. D. HOOSER,
Deputy Clerk. [8]

[Title of District Court and Cause.]

## MOTION IN ARREST OF JUDGMENT

Now comes Robert Donald Rowland, defendant in the above case, and asks that the verdict of guilty heretofore returned against him be arrested and no judgment and sentence be imposed thereon for the following reasons:

I.

That the indictment upon which the defendant was tried and convicted does not state facts sufficient to constitute a crime against the United States.

II.

Defendant relies on:

A. The points and authorities in the file, heretofore submitted, and on

B. The fact the Grand Jury itself has changed the content of its selective service indictments to conform to the objections raised by defendant.

/s/ J. B. TIETZ,
Attorney for Defendant. [9]

[Title of District Court and Cause.]

## MOTION FOR NEW TRIAL

The defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

Dated at Los Angeles February 25, 1953.

/s/ J. B. TIETZ,
Attorney for Defendant. [10]

[Title of District Court and Cause.]

RECEIPT OF MOTIONS AND WAIVERS

Receipt is acknowledged of Motion in Arrest of Judgment and Motion for New Trial in the above case.

Time for service of Motion is waived and plaintiff consents, subject to approval of the Court, that said motions may be heard on March 3, 1953.

WALTER S. BINNS,
United States Attorney;

RAY H. KINNISON,
Assistant U. S. Attorney, Chief of Criminal Division;

/s/ MANUEL L. REAL,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed February 25, 1953. [11]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MARCH 2, 1953

Present: The Hon. Wm. C. Mathes,

District Judge.

Proceedings: For sentence, on finding of guilty.

It is stipulated that motion for new trial and motion in arrest of judgment be heard at this time instead of on March 3, 1953.

Attorney Tietz argues in support of motions.

Court Denies motion in arrest of judgment and denies motion for new trial.

Court Sentences defendant to four years imprisonment for offense charged in Indictment, and orders bail of defendant exonerated.

EDMUND L. SMITH,
Clerk;

By /s/ P. D. HOOSER,
Deputy Clerk. [12]

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United States District Court for the Southern District of California, Central Division

No. 22530-Cr. Indictment
[1 Count—for Violation of 50 U.S.C. § 462]

UNITED STATES OF AMERICA,

vs.

ROBERT DONALD ROWLAND.

JUDGMENT AND COMMITMENT

On this 2nd day of March, 1953, came the attorney for the government and the defendant appeared in person and with his attorney, J. B. Tietz, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of having on July 28, 1952, in Los Angeles County, California, knowingly failed and neglected to perform a duty required of him under the Selective Service Act of 1948 and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do, as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the indictment.

It Is Adjudged that the bail of the defendant be exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and

that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,
United States District Judge.

EDMUND L. SMITH,
Clerk;

By /s/ P. D. HOOSER,
Deputy Clerk.

[Endorsed]: Filed March 2, 1953. [13]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Robert Donald Rowland, has been residing at 129 N. Greenwood Ave., Montebello, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Bldg., 257 S. Spring Street, Los Angeles 12, Calif.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462—Selective Service Act, 1948.

On February 9, 1953, the court found the defendant guilty [jury trial having been waived] and on March 2, 1953, the court sentenced the appellant to four years confinement in an institution to be selected by the Attorney General, and is presently in the Los Angeles County Jail.

I, J. B. Tietz, appellant's attorney, be authoribed

by him do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 4, 1953. [14]

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In the United States District Court, Southern District of California, Central Division

No. 22530-WM-Crim.

Honorable William C. Mathes, Judge, Presiding.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT DONALD ROWLAND,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

WALTER S. BINNS,
United States Attorney, by
JAMES K. MITSUMORI,
Asst. United States Attorney.

For the Defendant:

EDWIN H. HIBER, ESQ.,
Appointed by the Court.

Monday, October 27, 1952—11:00 A.M.

(Case called by the clerk.)

The Court: Is Robert Donald Rowland your full, true name?

The Defendant: Yes, sir. [2*]

* * *

Mr. Clerk, will you ascertain what is now the plea of the defendant to the charge in the indictment?

The Clerk: What is your plea to the charge in the indictment?

The Defendant: May I ask a question first?

The Clerk: Yes.

The Defendant: I would like to know do I have to be present in court to move that the case be dismissed, or can that be handled on paper, written?

The Court: You should be present at all stages of the [6] proceedings. You may sign a waiver of the right to be present if you so desire. The clerk will furnish your counsel with a form, and you need not be present at the hearing of any motion to dismiss unless you so desire, provided, of course, you sign the waiver.

The Defendant: Where can I get that?

The Court: The clerk will furnish your counsel with a form of waiver.

You have a form of waiver pursuant to Rule 43, Mr. Clerk? Hand it to counsel.

Are you ready to plead at this time, Mr. Rowland?

The Defendant: Yes.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: How do you plead to the indictment? Are you guilty or not guilty?

The Defendant: Not guilty.

The Court: The clerk will enter a plea of "not guilty" on your behalf. [7]

* * *

The Court: Mr. Rowland, I have before me a waiver of trial by jury and waiver of special findings of fact pursuant to Rule 23. It appears to be signed by you and by Mr. Tietz as your attorney; is that correct?

Defendant Rowland: Yes, sir.

The Court: Is it your desire to waive your constitutional right of trial by jury and have your case tried by the court without a jury?

Defendant Rowland: Yes, sir.

The Court: The case involves a question of law, does it not, Mr. Tietz?

Mr. Tietz: Yes, sir.

The Court: In your opinion, Mr. Tietz is the defendant's waiver voluntarily and understandingly made?

Mr. Tietz: Yes, your Honor.

The Court: Very well, I will approve the waiver.

You are instructed, Mr. Rowland, to return to Judge Tolin's courtroom on this floor of this building on **January 5th next at 1:30.**

Mr. Real: May it please the court, I think you set that for Thursday. I believe it was this Thursday.

The Court: Oh, I am sorry. Yes. It is set for 1:30. Thank you.

You will return Thursday afternoon of this week, December 4th, at 1:30, Mr. Rowland. Do you understand the time? [29]

Defendant Rowland: To this court?

The Court: To this courtroom. Do you understand the time?

Defendantant Rowland: Yes.

The Court: Next Thursday afternoon at 1:30.

(Intermission for other court proceedings.)

The Court: Mr. Tietz, in case No. 22,530 is there any question about the exhaustion of the administrative remedies in the Rowland case?

Mr. Tietz: There could be, your Honor, yes. He took no appeal. He did report but refused to submit to induction. So if the matter is raised as a stumbling block to his presenting his defense, your Honor might very well decide that he is foreclosed. If there is any possibility, through co-operation of the United States Attorneys' office, in having the local board giving that chance, we would certainly welcome it. In the past I have not been able to secure that, except when there is an outright violation such as having made his request within the 10 days period and he has not gotten it.

The Court: In two cases this afternoon they were continued to permit further administrative proceedings, and it occurred to me that that same problem might be involved in the Rowland case. I am not suggesting whether there is any merit or lack of merit in the possibility, or not. [30]

Mr. Teitz: We would welcome it. And I would

ask the court—and I am pleased that the court has on its own motion brought the matter up, placed the matter back in the calendar and given the defendant that opportunity, if the United States Attorney will intercede.

The Court: This case is set for Thursday afternoon at 1:30 now.

Mr. Tietz: Yes, your Honor.

The Court: Does the Government have any views on that?

Mr. Edward J. Skelly (Assistant U. S. Attorney): No, your Honor. Mr. Real, who is handling that, your Honor——

The Court: Has the defendant Rowland left?

Mr. Tietz: I am certain, because I have been out in the hall and he is not there.

The Court: Perhaps you gentlemen might consider it and we will take it up Thursday afternoon at 1:30. Other cases have been put over to permit that opportunity. I may be in error, but it just occurred to me from the Rowland file that that probably might be lurking there.

Mr. Tietz: This is the first time we have been accorded that opportunity by any United States District Judge, I might say, or any of my clients, and I appreciate that.

The Court: Very well, we will take it up Thursday at 1:30, gentlemen.

(Whereupon, a recess was taken until Thursday, December 4, 1952, at 1:30 o'clock [31] p.m.)

Thursday, December 4, 1952, 1:30 P.M.

(Appearances as last heretofore noted.)

(Case called by the clerk.)

Mr. Real: Ready for the Government, your Honor.

Mr. Tietz: I appear for the defendant, your Honor.

Mr. Real: The defendant is present in court, your Honor.

The Court: Are you ready? How long will it take, gentlemen?

Mr. Tietz: Your Honor, this was a matter in which the suggestion was made that a continuance of 30 days might be advisable for the purpose of securing a reprocessing, a partial reprocessing by the Selective Service system due to the fact that this defendant had never had a personal appearance nor an appeal on his claim that he was a conscientious objector. His claim was recognized to an extent he was given a I-A-O, but only to a limited degree.

I am informed today, a few minutes ago, that Maj. Keeley, Area Co-Ordinator, has said "no" to the Government's suggestion that there be this partial reprocessing.

My request to the court is this: That it still be continued for some period so that an effort can be made, partly by me and partly by the Government, and this is what I would represent to Maj. Keeley: That there is always a possibility that the court in sentencing this defendant, if he should be [32]

unable to win the verdict of acquittal, might do what a judge of this court did on September 22nd, and that is make a probationary order with the usual conditions, but with this unusual one, that the defendant not be required to obey any Selective Service law unless—now, your Honor, this was not——

The Court: You do not need to proceed any further. I would never make a probationary order that anyone not be required to obey any law.

Mr. Tietz: Now, your Honor, may I finish my sentence?

The Court: Yes.

Mr. Tietz: And it may throw a different light on the whole situation—unless the Selective Service system give the boy the appeal, and if the Selective Service system gives the boy an appeal, which he never had, and an order is thereafter made that he report for and submit to induction, that he be required then to obey that order.

So that, Judge Yankwich, by that order, which I may state was an order that was made in many, many cases during World War II—I have a list of the numbers, the cases and the judges of 50—I stopped then because my purpose was served and I did not go back farther—50 probationary orders, all of which I consider genuine probationary orders. I checked those myself. * * * [33]

So what I am hoping might eventuate, I say I am going to represent to Maj. Keeley and the others involved, might possibly be your Honor's order, is that we have a great deal of precedent from this court, all eight judges sitting on the bench

during World War II up to the surrender of Germany, because after that I think there was a dropping off.

So that it is entirely possible that when Selective Service is informed of what just happened recently they will say the boy should have his appeal and we will give him the appeal. That is all we request. My request is that there be a continuance of some sort for the purpose of permitting me to go to Selective Service with that request.

Mr. Real: May I be heard, your Honor?

The Court: Yes.

Mr. Real: It is the feeling of our office that, first of all, we have no guarantee that even if we could procure the requisite signature from the Attorney General, we have no guarantee of any possible kind that this thing would not be repeated again even after appeals and hearings by officers other than the Local Board. Our indictment is based on the fact that this defendant was properly ordered to induction in the armed forces and that he refused to submit to induction.

The Court: Do you oppose the motion for a continuance? Is that what you are saying? [34]

Mr. Real: Yes, for the continuance of 30 days for the purpose of reprocessing, the Government does oppose the motion, your Honor.

Mr. Tietz: The time need not be 30 days, your Honor. Inside of a week or two I could get the matter determined by the Selective Service, deter-

mined as to whether or not they will give the boy the appeal.

The Court: There has been a waiver of trial by jury here?

Mr. Tietz: If there has not, there will be one.

The Court: There is one in the file. Does the Government oppose?

Mr. Real: I beg your pardon?

The Court: Does the Government oppose a continuance?

Mr. Real: It opposes the continuance for 30 days, yes, your Honor, for the purposes stated by Mr. Tietz. Yes.

The Court: How much time will you need, Mr. Tietz?

Mr. Tietz: Oh, I would think two weeks would be sufficient, because Maj. Keeley may wish to refer to Sacramento. He may not want to take the full responsibility himself. I can state there has been at least one instance where he wanted to do something to help out a boy I represented and it was overruled later. So I think two weeks will be sufficient.

The Court: Does the Government oppose that?

Mr. Real: Your Honor, from my talk with Maj. Keeley [35] this morning he seems to be of the opinion that there was nothing that could be done so far as the Selective Service Board was concerned; that as far as they were concerned this defendant was processed through their processes, all the processes that they could do under the circumstances. He made no request.

The Court: Mr. Tietz just wants one more chance, I suppose, is that it?

Mr. Tietz: Yes, your Honor. If for no other reason than when we do come into court, if we must come into court, I won't be blocked from presenting the defense that he has not exhausted his administrative remedies.

The Court: Is it your contention that he has not exhausted his administrative remedies?

Mr. Tietz: That statement was made Monday, and frankly, when I was aware that the Government might present that to block me from presenting a defense—now, I think he has got a good defense, even as it stands now, and if I should not be able to present that defense solely because he has not exhausted his administrative remedies, it would be certainly very sad for the defendant.

The Court: Has he exhausted his administrative remedy? Is there a contention he has not? I made the suggestion possibly he had not, but I think I was in error from the fact that the Government contends, at least. [36]

Mr. Teitz: My understanding is that he never had an appeal; is that correct? And his answer, which may or may not be determinative of exhaustion, is that he went down to the local board office within the 10 days period to do the next step and the clerk said: "There is nothing more you can do." And if I get by the argument that he has not exhausted his administrative remedies, I am presenting the argument on frustration, which may or may not appeal to your Honor. If it does not

appeal to your Honor, this boy's defense can't be made out.

The Court: Cannot be made out?

Mr. Tietz: If your Honor follows me and says he has not exhausted his administrative remedies because he did not take an appeal.

Mr. Real: If it please the court, from the evidence——

The Court: Does the Government contend that this defendant has not exhausted his administrative remedies?

Mr. Real: I contend that he has exhausted his administrative remedies, because the regulation and the notice of classification is quite clear, in precise language, that any appeal that is to be taken is to be taken within 10 days after classification and must be in writing, and that was not done in this case. So he has gone as far as he can go legally in exhausting his administrative remedies.

The Court: Assuming he was ordered to report for [37] induction, did not that mark the exhaustion of the administrative remedies, Mr. Tietz?

Mr. Tietz: I was going to rely on that Gibson decision of the Supreme Court that I would be permitted to present my defense. But when on Monday this matter was brought up and I thought that the court would take a different view and would think that because he had not availed himself of the opportunity for an appeal, which would give the Selective Service a chance to remedy its own mistake, and that I therefore might be blocked, I jumped at the court's very kind offer that he

have this chance to exhaust his administrative remedy. But if the position the Government has now stated is that he has exhausted his administrative remedy, if that is going to be their position at trial, then my reason has been cut out for another hearing and I have remaining only the reason that it might be better for all concerned, including the court's time, that this boy does get an appeal. Because a boy that is given a I-A-O has a good chance of getting a I-O from the appeal board, because he has been submitted by the local board as sincere and having genuine scruples.

Mr. Real: If the court please, this is not the question in this case. This case is quite clear under the Cox decision that the only decision to be made is whether or not he was ordered under a valid order to be inducted and whether he refused to obey that order. [38]

The Court: Mr. Tietz is raising a technical question, as I understand it, rather than a legal one, aren't you?

Mr. Tietz: Yes, now I am in that position.

The Court: You just want some time to see if the Selective Service system wishes to do anything more about it, is that it?

Mr. Tietz: Right.

The Court: Not as a matter of right but as a matter of grace.

Mr. Tietz: No. It has become that, yes.

The Court: In view of the Government's position that the administrative remedies have been exhausted legally.

Mr. Tietz: Yes.

The Court: How long will that take, two weeks?

Mr. Tietz: Two weeks would be sufficient time.

The Court: Is there any prejudice to the Government?

Mr. Real: There will be no prejudice to the Government. We oppose that sort of a motion, for the purpose of information, only on policy.

The Court: How long will it take to try this case, Mr. Tietz?

Mr. Tietz: An hour and a half or two hours at most.

Mr. Real: That is our estimate, your Honor.

The Court: Let us continue it, then, to December 22nd, for Tuesday or Wednesday, just prior to Christmas. December [39] 22nd, at 1:30, Monday afternoon, and try the case probably Tuesday, Tuesday morning or Tuesday afternoon.

Mr. Tietz: And the defendant appears at 1:30 on the 22nd?

The Court: Yes. Is that an agreeable time to both sides?

Mr. Real: It is agreeable to the Government, your Honor.

The Court: Very well. Mr. Rowland, you will return to this courtroom on December 22nd next, at 1:30 in the afternoon. Do you understand the time?

The Defendant: Yes, sir.

(Whereupon a continuance was taken until Monday, December 22, 1952, at 1:30 o'clock p.m). [40]

Monday, December 22, 1952, 1:30 P.M.

The Clerk: No. 27 on the calendar: 22,530-Criminal, United States of America vs. Robert Donald Rowland. Mr. Manuel Real for the Government, Mr. Tietz for the defendant. Is the defendant present, Mr. Tietz?

Mr. Tietz: He is.

The Clerk: And are you the defendant?

Defendant Rowland: Yes.

The Court: Did you hear anything from the state director in this matter?

Mr. Tietz: The answer is "no," your Honor.

The Court: Very well. How long will it take to try the case?

Mr. Tietz: Perhaps two hours.

Mr. Real: About half a day, your Honor.

The Court: Is tomorrow morning agreeable at 10:00 o'clock?

Mr. Tietz: Yes, your Honor.

The Court: Very well, I will continue the case for trial. It is non-jury, is it not?

Mr. Tietz: That is right.

The Court: Until tomorrow morning, December 23, at 10:00 o'clock. You are instructed to return at that time to this courtroom, Mr. Rowland. Do you understand the time and place? [41]

The Defendant: Yes, sir.

The Court: Very well.

(Whereupon a recess was had until the following day, Tuesday, December 23, 1952, at 10:00 o'clock a.m.) [42]

Tuesday, December 23, 1952, 10:00 A.M

(Counsel present as last heretofore noted.)

The Clerk: Case No. 22,530, United States vs. Robert Donald Rowland.

Mr. Real: Ready for the Government, your Honor.

The Court: Is the defendant present?

Mr. Tietz: Yes, your Honor.

The Court: You may proceed.

Mr. Real: Your Honor, at this time the Government would like to waive its opening statement in view of the trial memo filed with your Honor in this case.

The Court: You may. The jury waiver has been approved, has it?

Mr. Real: Yes, your Honor.

The Court: The defendant still wishes, I take it, to waive the right of trial by jury and proceed?

Mr. Tietz: Yes. That has been his desire always.

The Court: Very well, you may proceed.

Mr. Real: Call Maj. Keeley, please.

ELIAS M. KEELEY

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Elias M. Keeley, K-e-e-l-e-y. [43]

Direct Examination

By Mr. Real:

Q. Maj. Keeley, what is your occupation?

A. I am a Major in the United States Army, as-

(Testimony of Elias M. Keeley.)

signed to Selective Service, and have charge and known as the District Co-Ordinator for Selective Service System.

Q. As part of your assignment do you have legal custody and control of the Selective Service files of registrants for local boards in your area?

A. I have the general supervision of all files in Southern California.

Q. Do you know the defendant Robert Donald Rowland?

A. I know him by sight and I have talked with him.

Q. Do you see him in court today?

A. Yes.

Q. Will you point him out, please?

A. He is sitting alongside of Mr. Tietz.

Q. Is the defendant Robert Donald Rowland a registrant, to your knowledge, of Local Board 113?

A. We have a Robert Donald Rowland that is a registrant of Board 113, yes.

Mr. Real: May it be stipulated that this Robert Donald Rowland who is the defendant here in court is the same Robert Donald Rowland who is a registrant of Local Board 113?

Mr. Tietz: Yes. [44]

Q. (By Mr. Real): You have brought with you today an original of his Selective Service file?

A. I have.

Mr. Real: Will the clerk place Government's Exhibit 1 for identification before the witness?

Q. Government's Exhibit 1 for identification now

(Testimony of Elias M. Keeley.)
before you, Maj. Keeley, that is the original Selective Service file of Robert Donald Rowland?

A. That is correct.

Q. And is it the normal course of Local Board 113's business to keep that record, and that record is kept in the normal course of Local Board 113's business? A. It is.

Mr. Real: At this time, your Honor, we would like to introduce into evidence Government's Exhibit 1 for identification.

Mr. Tietz: All right for identification, your Honor. And I might state——

The Court: It is offered into evidence now.

Mr. Tietz: We have no objection to the introduction of the file, the complete file, into evidence, except for the following item—and I think we could save time by going into that matter now.

The Court: Very well.

Mr. Tietz: Page 27—these pagination marks have been [45] made by the Clerk, I believe, and not the normal numbers of any of the sheets. They are found at the bottom of each of the sheets and circled. Pages 27 and 29 are duplicate pages.

Our objection to both is that it is a document that is dated August the 1st, 1952, long after the processing of the defendant. but that would not be too material. Our chief objection is that it contains a misstatement. It says that he is a member of Jehovah's Witnesses, and I think that will be conceded, and therefore I ask the Government to stipu-

(Testimony of Elias M. Keeley.)

late that these two sheets not be included in the file under "D."

The Court: The defendant is not a member of Jehovah's Witnesses?

Mr. Tietz: That is correct: There is no dispute about that.

The Court: Does the Government so stipulate?

Mr. Real: So stipulated, your Honor.

Mr. Tietz: And then the defendant will object to the admission into evidence of sheet 51 which bears the Local Board's stamp July 31st, for the same reason; and our actual non-technical reason is that the Reverend Page, who is referred to in this memorandum that the clerk made and inserted, herself, in the file——

The Court: The clerk of the local board? [46]

Mr. Tietz: Yes. It bears her signature and it is a mere typing of a memo on a sheet of paper, and it will confuse the record for this reason: This Rev. Page is not the minister of this defendant's church, represents a different fellowship, a non-pacifist fellowship, and the statement made here by the clerk ascribing certain beliefs to him are not the beliefs of this defendant, and therefore would confuse the record.

So I ask the Government to stipulate that sheet No. 51 not be made part of the record.

Mr. Real: So stipulated, your Honor.

The Court: As I understand the stipulation, it is that pages 27, 29 and 51 of Exhibit 1 for identification, the pages so marked with those numerals in-

(Testimony of Elias M. Keeley.)

closed in circles at the foot of the pages designated, not be received into evidence.

Mr. Real: May it please the Court, page 27, one of those may be deleted, but we ask that one of them be in, with the possible interlineation and the correction as to the Jehovah's Witness, and that the "Church of Christ" be inserted in it. That is part of his record, your Honor.

The Court: We cannot change the Selective Service records. You may stipulate that they are incorrect to that extent.

Mr. Real: I will stipulate to that extent that they are incorrect, but not that they will be deleted from the file, your Honor.

The Court: Is there any objection to pages 27 and 29 [47] in view of that stipulation?

Mr. Tietz: No, the defendant has no objection.

The Court: What about page marked "51," then?

Mr. Real: We will stipulate that it may be deleted, your Honor.

The Court: Very well. Then Exhibit 1 for identification is now received into evidence, with the exception of the page thereof marked "51" which Mr. Tietz has heretofore described, Mr. Tietz referring to "Rev. Elwood A. Page." That is your objection, Mr. Tietz?

Mr. Tietz: Yes, your Honor.

The Court: Very well.

Mr. Real: May I have Exhibit 1-A for identification?

(Testimony of Elias M. Keeley.)

The Court: Mr. Clerk, you will mark the sheet designated "51" as Exhibit 1-A for identification.

The Clerk: Your Honor, there is already another file marked 1-A. There is a photostatic copy to substitute.

The Court: What is Exhibit 1-A?

Mr. Real: 1-A is a photostatic copy, your Honor. I am about to make a stipulation.

The Court: Let it be Exhibit 2, photostatic copy of the file.

Mr. Real: That is correct, your Honor.

The Court: And the deleted page 51 from Exhibit 1 will be marked 1-A for identification. The Exhibit 2 is a photo-copy [48] of the complete file?

Mr. Real: That is correct, your Honor.

The Court: Does it contain a photostatic copy of——

Mr. Real: The particular pages deleted?

The Court: No, the page 51, which is the only page deleted.

Mr. Real: That is correct, your Honor.

The Court: And let us now mark it Exhibit 1-A for identification.

Very well, Mr. Clerk, will you remove this page marked "51" from Exhibit 2 for identification and mark that page Exhibit 2-A for identification?

The Clerk: Yes, your Honor.

Mr. Real: May it please the Court, may it be stipulated that Exhibit 2, Government's Exhibit 2 for identification, is a photostatic copy of the Selec-

(Testimony of Elias M. Keeley.)
tive Service file of Robert Donald Rowland marked Government's Exhibit 1-A in evidence?

The Court: 1 in evidence.

Mr. Real: I am sorry, your Honor. No. 1 in evidence, and that it be introduced into evidence in lieu of the original Selective Service file of Robert Donald Rowland marked Government's Exhibit 1, and that Government's Exhibit 1 be withdrawn from evidence at this time and returned to this witness, your Honor.

Mr. Tietz: The defendant will so stipulate. [49]

The Court: Very well, so ordered pursuant to stipulation. Exhibit 2 for identification is received into evidence. Exhibits 1 and 1-A for identification may be withdrawn and returned to the witness.

Mr. Real: Cross-examine.

The Court: Have you any cross-examination of this witness?

Mr. Tietz: No cross-examination.

The Court: You may step down, Maj. Keeley.

Mr. Real: The Government will rest its case at this time, your Honor.

Mr. Tietz: The defendant would like to make a motion to acquit. The defendant has two grounds for his motion. One is very substantial and the other is a matter of first impression, and it might well be that, on a technical basis, it alone is sufficient.

The defendant's first ground is that there must be a basis for every Selective Service classification, although the defendant would be willing to concede that perhaps there need not be—I will invite the

Court's attention to the various parts of the exhibit as I make my argument on this point.

The defendant would perhaps be willing to concede that the Selective Service system may give registrant a I-A classification without any basis of fact because of the wording of the definition of "I-A" that places the burden on [50] the registrant to satisfy the board that he is entitled to or has a status of some other classification. But that, fortunately, does not enter into this case.

While there have been a number of decisions that I-A classifications have been given without any basis of fact, a number of acquitals, fortunately we do not have as difficult a problem as that here. We have what I think is a comparatively easy problem.

We have a situation where the local board has stamped this defendant a truthful, sincere and honest registrant who is a conscientious objector. He professes to be one. They say he is one. And, of course, according to the Supreme Court decisions interpreting the intent of Congress, their decisions of fact are final; and in the absence of some arbitrariness, in the absence of some denial of due process, the court cannot go behind it. We are not asking the court to go behind their decision that he is a genuine conscientious objector.

We point out to the court that what the board has attempted to do is this: It has attempted to say—your scruples with respect to the conscientious objection that you profess to have and which Congress says you are entitled to have and are to be respected, that those scruples do not go as far as you say they

go, and we therefore are drawing a line—a line that you do not draw. We draw the line at I-A-O. We say [51] that, on the facts before us, presented by you or gathered by us and reduced to writing, which is what the regulations require, on the facts before us—put in other words, the file—we see that you are willing, really, as a matter of fact, to do non-combatant work. You say you are not, but the facts show otherwise.

Now, if there is something in the file—and this is a challenge to the Government—if there is something in the file that they could put their finger on and say: This is the basis of fact for the board's decision, then my point is gone.

I have gone through the file. I do not see it. Possibly some ecclesiastical reference, some scriptural quotation he has given might be tortured into some line-drawing that he does not make. I do not think so.

I have gone over it carefully, and while I do not profess to know the scriptures that well, I do not think there is anything and I say to the Government, "point out any one fact."

Now, the reason why I wanted page 51 out of the record—I am now making an argument I think I will be allowed to on this point. Page 51 is the memo made by a clerk of the board of a conversation she had with a minister of a Church of Christ.

It is common knowledge that there are six branches, six different fellowships of the Church of Christ. One of those [52] six is known as a pacifist fellowship. There are 200 congregation in that fel-

lowship. That is the fellowship that this defendant belongs to. And it so happens that Rev. Page was and he is an old friend of the boy's grandmother, which, if necessary, will come out in the evidence if we are required to put on our defense evidence.

I am anticipating, but I want the court to understand why I am making this argument. It will save time later. That when Rev. Page is quoted as saying that the I-O, the complete conscientious objector position, is not the position taught by his church, that that is not binding on this defendant and was made long after, made a year and a half after the classification was made. So that could not have been the basis for the board's classification. But in order to keep it out of the record, that there could be a scintilla of evidence, even, I might say, by taking what was said a year and a half later, I wanted it out at that time, but I am sure within the stipulation by the Government it should go out.

So I say this: The Government must show something. It would be too much of a burden on the court to find something, and I tried to find something. The Government has studied the file, and Maj. Keeley has had more experience. Let them point out one thing on which the court can say that is a basis of fact for this decision.

There have been quite a number of decisions, [53] district court decisions, it is true, on this point. Unfortunately, they are all district court decisions and none of them have as yet been reported, but I have slip sheets on all of them, the ones that I will mention. I would like to read just one paragraph from

one of them to give the court the reasoning of the other district judges who have been faced with this problem. I will read from the case of United States of America vs. James J. Relyea, the opinion of the court March 18, 1952. It is the Northern District of Ohio, Eastern Division, Judge McNamee. And on page 2 of his opinion he says:

"I think it would have been more difficult for the court to find the act of the board was without any basis in fact if the board has classified this man in I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objection on the religious grounds as being truthful, but they attempted—and in my opinion, without any basis in fact—to assert that, while he was sincere and conscientious, that sincerity and conscientiousness extended only to his aggressive participation in military service and that he was not sincere in his statement that he was opposed to war and participation to war in all its forms."

And that is precisely the situation that we have here. [54] I am satisfied, your Honor, that that alone is enough to justify the court in granting the motion.

Now, I have another matter which I wish to present to the court that, as I said, is a matter of first impression in that no court has yet been called on to rule on it. I think it is something which one of these Selective Service defendants should bring up, and the court could very well use it as its sole basis for granting the motion.

I will read from the Selective Service regulation.

I am reading from Section 1604.56. And while this is the page which was promulgated in the Federal Register, I suppose, September 24th, it is dated September 28, 1951. I assure the court that this particular regulation was in effect in exactly these words at all times during the processing of this defendant. I mention that because these regulations change quite frequently, as the court might know. I have two volumes of obsolete ones. They are just as thick as the main one.

This regulation says this——

The Court: What is the number of it?

Mr. Tietz: 1604.56, from 32 C.F.R It reads as follows:

"Each local board shall elect a chairman and a secretary. A majority of the members of the local board shall constitute a quorum for the [55] transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. In case of a tie vote on any question or classification, the board shall postpone action on the question or classification until it can be decided by a majority vote."

And then it goes on with some matters which do not concern us.

I will invite the court's attention to what is now paginated as page 11, which gives the fact page or page (8) of Selective Service form No. 100, classification questionnaire, and it is called: "Minutes of Actions by Local Board and Appeal Board."

We see after every action of the board, such as the second lines: "Nov. 15, 1950 I-A-O," and we also see on August 13, 1952, when they declared him a delinquent, we see two things, a numerical vote and a set of initials. And I say "a set," I mean one set for each line. The vote in one instance says "3-0" with reference to "I-A-O" classification, and there is one set of initials "C.K.H."

On the other action it was "2-0," so it says, and the initials are "E.G."

Now, my argument is this: The Supreme Court in Old vs. [56] Smith has declared that when an individual signs a document with his initials he is merely abbreviating his name. So that my next step here is, you have a written name, and my point, therefore, is, we have a conflict between the writing and numerals, and the broad rule of law, I say, governs, that writing takes precedence over numerals.

Now, it may well be that actually there was a quorum at each of these meetings. It may well be that each of the board members did as he was required to do and voted. But my point is the record does not show that and we, I say, have made out a prima facie case that there was no quorum present and that a majority of the members or a quorum did not vote for these particular classifications.

Possibly the plaintiff can come in and show that that is not so, but until that is shown, unless there is an offer to show that, I say that there is no quorum present.

For these two grounds the defendant is entitled to a dismissal, should be sent back to the Selective

Service system where, this time, he can get what Congress has assured him he should have—a determination of his claim, meaning a complete determination with the whole procedure.

When the court goes through the file in trying to determine it, I say, in determining whether or not there is a basis of fact, the court will be struck, I believe, by one of the sheets that I invite the court's attention to now. [57]

The Court: Is there anything in the record to indicate that these initials are initials of members of the local board?

Mr. Tietz: Yes, your Honor. My argument on that point would be this: We look at the initials and we see they end up with an "H." We also see the handwriting. We look at the order to report for induction and we see that it is signed, as it can be, by a member of the board named Horn. We look at the handwriting and we see it is the same handwriting.

The Court: I noticed on page 11 where three members purportedly voted to classify the defendant as I-A-O, that there is only apparently the initials of one person.

Mr. Tietz: Yes. That is what I am unhappy about. That is what I think shows, at least prima facie, that there was not a quorum. The evil that the regulation that I read obviously tries to avoid is this: The defects of the minds are such that some board members, since there are thousands of board members—that some board member might, as we say in the vernacular, go off his rocker and might

come down to the board office sometime and, all by himself, classify everybody I-A, and a quorum must be present. He might out of malice. And so General Hershey, in the name of the President, promulgated this regulation, and I say it is a good regulation, that there must be a quorum present and a majority must vote for every classification. [58]

The Court: Would you read that regulation again? That is 32 C.F.R. 1605.54.

Mr. Tietz: ".56," your Honor.

The Court: "56."

Mr. Tietz: In italicized printing it is entitled: "Organization and meetings." That is all, and I will read every word and the punctuation, your Honor.

"Each local board shall elect a chairman and a secretary. A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. Every member present, unless disqualified, shall vote on every question or classification. In case of a tie vote on any question or classification, the board shall postpone action on the question or classification until it can be decided by a majority vote. If any member is absent so long as to hamper the work of the local board, the chairman of the local board shall recommend to the State Director of Selective Service that such member be removed and a new member appointed."

I think we can stipulate that this qualification,

that [59] proviso about disqualification, refers only to when a board member is a relative or some such —Maj. Keeley is very familiar with that—so that it does not enter into this picture here.

Now, there is one sheet that I would like your Honor to read before arriving at a decision as to whether or not there is a basis of fact. That is a letter that the young man wrote to the local board. He wrote two in fact, and I find this one at pages 53 and 54, but the other one is shorter. It is at 25, page 25, and very revealing.

The Court: Does that complete your argument?

Mr. Tietz: Yes, your Honor.

Mr. Real: May it please the Court, answering Mr. Tietz's argument, first, on classification, it would be just calling your attention to Regulation 1622.10.

"Class I-A: Available for military service. In Class 1-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class."

It is the Government's position that a registrant starts out under this regulation with a I-A classification and upon him the duty is placed to show that he is entitled to some other classification. [60]

Mr. Tietz asks us to show some basis in fact for the classification of the local board. I call your Honor's attention to the page paginated 14 and to the paragraph "(e)":

"Describe carefully the creed or official state-

ments of said religious sect or organization in relationship to participation in war."

Under that sentence the defendant and the registrant at that time placed these quotations from the Bible:

"it is wrong to kill (Romans 13:9), it is wrong to fight with carnal weapons (2 Corinthians 10:3-5; Ephesians 6:12; Matthew 26:52) it is wrong to participate in carnal warfare (John 18:36)."

This registrant started out with the classification of I-A presumptively. From there we go to what this particular statement, which is the only statement that we have, since it is quoted also on page 12, the answer to sentence 2, in essentially the same language.

It is the Government's position that this is just a matter of interpretation of the Bible and that the local board could reasonably have given this registrant the classification that it gave him, "I-A-O," and "I-A-O" classification is a classification given to men who are opposed to participation in combat service but who are not opposed to participation as a non-combatant. [61]

There is no evidence in the file any place of this particular registrant that he could show at that time that he was objecting to non-combatant service, other than the signature of his name under paragraph (B) Claim for Exemption Series I on page 12.

The Court: Page 12?

Mr. Real: That is correct, your Honor.

The Court: He makes that statement under oath, doesn't he?

Mr. Real: No, your Honor. This is not a form under oath This is merely a form that is submitted to the board. It is taken home or sent to the registrant and is not under oath. There is no evidence to this statement.

Then he goes on to strengthen that by his quotations from the Bible. It is the Government's contention that those quotations do not show an objection to participation as a non-combatant in service.

The Court: Well, is it the Government's position that the registrant must cite Biblical authority for the dictates of his conscience?

Mr. Real: It is not the contention that he must cite Biblical authority; but it is the contention of the Government that he must support his signature or his opposition to war so that the local board may have something on which it is to base its classification if he is to be classified a complete [62] conscientious objector. That was not done in this case.

Further, answering the second question that Mr. Tietz raised——

The Court: Before you do that, suppose a registrant comes in and says: I believe that. That is my creed. I believe it. Those are the dictates of my conscience.

Where did I learn it? I learned it in Sunday School when I was 12 years old. It has always been my creed. That is the only religious training I have had.

Mr. Real: I think, your Honor, that the cases on the classification as to I-O or as to a conscientious objector and the law in that respect is that if a per-

son is entitled to a classification of I-O, not on the basis of his own philosophical convictions, but on the basis of religious training and beliefs——

The Court: He says that is what I was taught in Sunday School.

Mr. Real: Then I think, your Honor, it is a question of fact as to whether the local board believes him or not, and that question is not before this court.

The Court: The point here, as I understand it, is this: He says that is what I was taught and that is what I believe. Now, the statute says "Religious training and experience." What does "experience" mean?

Mr. Real: Well, "experience" to me, your Honor —I [63] do not know what the statute means in itself—"experience" to me is the sum total of the life of an individual.

The Court: He says: By reason of religious training—I am sorry—not "experience," "religious training and belief."

Mr. Real: The question of religious training may be shown by documentation. The question of belief is a question that would not be shown by documentation, your Honor. I think it is a question of either believing a registrant or not believing what he says.

The Court: The registrant must have religious training, I take it, which teaches him these things, plus his own conscientious objection from that teaching.

Mr. Real: That is correct, your Honor. And, as a basis, the defendant places in the file these answers

to these questions: That it is wrong to kill; it is wrong to fight with carnal weapons. Taking it just from general knowledge, the question of the interpretation of the Bible, I think each recognized religion has a different interpretation of what the words "It is wrong to kill" mean. Some religions believe it is wrong to kill lest you kill in self-defense. Other religions believe it is wrong to kill even in self-defense. So I think it is a question of this particular registrant.

If he has not shown that to the satisfaction of the local board and they classify him, that classification is final [64] under the Cox case.

The Court: The point made here, as I understand it, is that if this registrant believes at all, there is no rational basis for believing him halfway and not believing him all the way.

Mr. Real: The question of his belief, from the evidence in the file, would lead reasonable men to believe that this particular registrant was opposed to combatant service but not to non-combatant service, and that is the classification he was given.

The Court: Do you intend by that to suggest that the board believed him as to the combatant service but not as to the non-combatant?

Mr. Real: It would appear from the classification that they gave him that that is exactly what they did.

The Court: You may proceed to the next point.

Mr. Real: Along those lines, I think, your Honor, once that that has been established and that

the local board has made the classification, it is final, within the ruling of the Cox case.

As to Mr. Tietz's second point as to regulation 1604.56, I think that I have only just one or two things to direct to that. First of all, that Mr. Tietz has forgotten, evidently, the presumption of regularity that goes to official procedures; and that there is nothing in this regulation that shows [65] or that requires that every member of the board initial or sign any part of the findings of that particular meeting. It says only that they must participate, and that in participating they must vote unless disqualified. I think that the record itself stands on that.

I think that the entry of "3-0," since there are three members in a local board, shows that there was a quorum there sufficiently enough, and that the quorum voted and the vote was 3 to nothing, and the entry was made by somebody whose initials are "C.R.H." and it would take an expert, I think, to determine whether "C.R.H." was the same person who signed the order of induction.

And I also think that, since when a board consists of three men, that a vote of "2-0," would show that there was a quorum present, since a quorum is only a majority of the board, and that two votes were cast, and the result of the vote was 2 to nothing, and that that vote was initialed on entry by a person whose initials are "E.G."

I think in consideration of that, we just stand on the presumption of regularity in these proceedings, and on that point, the definition of the Cox

case that the record is the summation of the classification and that that is what is to be considered upon the review by this court.

Mr. Tietz: Might I have two or three minutes, your Honor?

The Court: You may. [66]

Mr. Tietz: I will make comment on the second point first. The defendant concedes that there is a presumption of regularity for all official acts. The defendant contends that the presumption has been met by the prima facie case the record presents, and that the burden then is on the Government to go forward if it can.

With respect to another portion of that point, the Government states that it was a three-man board. I believe there was no evidence to that effect. And while we might be inclined to concede, because it is not known to me that it was not a three-man board, it is a fact that there are five-man boards, and the regulation—I haven't the place open, but I think the Government will stipulate that there are five-man boards. So that in the face of the statute record, we do not know if this was only a three-man board.

But I would like to go on to the other matter which does require more than some technical consideration.

The Government did not read another answer that this defendant gave in the same questionnaire, merely referred to it.

On page 12, wherein he answered the second question of the second series, the second series being

entitled: "Religious Training and Beliefs" and the second question being:

"Describe the nature of your belief which is the basis of your claim made in Series I above, [67] and state whether or not your belief in a supreme being involves duties which to you are superior to those arising from any human relation."

The defendant wrote out, and I admit it is a little difficult to read, but I think we should understand that fully because I believe it completely answers the question that was made, the argument made was that he did not say he was opposed to non-combatant service, and I say this does answer that squarely. He says:

"I believe that it is wrong to kill."

And I believe it is a Romans quotation he gives. He goes on to say:

"that it is wrong to fight with carnal weapons."

He gives a Corinthian reference. Then he quotes Ephesians and Matthew. And then he goes on to say:

"And participate in carnal warfare."

Quoting John; and then he gives the expression which I think makes it doubly certain:

"Since these are the duties of Military Service I can't join them."

He goes on to say:

"I also believe it is my duty to meet with the Church of Christ on the first day of the week."

I think that can be interpreted to mean that any duty of military service would interfere with his religious duties, [68] but I do not rely too much

on that. I rely on the others, that wearing the uniform is something he can't do, because he is joining with the others. And I think if the court were to look up the Second Corinthian reference, I think the court would find a very interesting reason that he gives there, because Second Corinthians, if I remember correctly, reads something like this: "I shall not be united in any manner with unbelievers." And that is another reason which many pacifists give for not wanting to be in uniform. It may not be a strong reason to you or me, but to a man who asserts it for religious reasons it may be as strong as the other.

He goes on finishing this question:

"I believe that I should obey the Lord rather than man."

In any event, it seems to me that it is torturing this file, when you take all the professions he has made, to say that he has not made the profession that he cannot participate in any way in warfare.

The Court: He has made that declaration; there is no question about that, is there?

The question here, Mr. Tietz, is whether any local board or whether this local board acted within the bounds of reason under all the circumstances, isn't it?

Mr. Tietz: I say the dilemma the local board is in, and the local board could solve the dilemma very easily—— [69]

The Court: You and I might decide these differently. These problems of conscience are very delicate problems. Someone must decide them.

Mr. Tietz: Correct.

The Court: And if the board had classified him in I-O, I do not suppose anyone would contend that there was no reasonable basis for that classification.

Now, by the same token, can anyone say that the classification I-A-O was not within the bounds of reason?

Mr. Tietz: I do, and I do for these reasons: If they had said to him we give you a I-O, then I would be in an almost untenable position, because by giving him a I-O they would be saying: We do not believe your professions, and that right has been given them by Congress.

The Court: You mean I-A?

Mr. Tietz: I-A, yes. But when they say: We do believe you, but when they give him a I-A-O they believe him, they stamp him as a conscientious objector. They try to draw a line, and maybe there is a line. Some of these files do show that there is a line, but this file does not show there is a line. And if it can be pointed out where the line is, then I would say that my argument just doesn't apply. The Government's argument, the real argument, is that they did not believe him. They did believe him, but they attempted to do an illegal thing. [70]

I will put it this way, your Honor: The local board and the whole Selective Service system under the intent of Congress, under the Supreme Court decisions, has the right to be wrong, as any one of us has a right to be wrong in our judgments. But it has not the right to be illegal, and when it makes a decision that has no basis of fact, when it draws a line that he does not draw, that none of

his evidence draws, it is illegal; it is beyond its jurisdiction.

Very often a young man comes in to a board and says in effect: I am a I-O, and then he presents evidence which shows he is not a I-O; he is only a I-A-O.

If this board did the right thing, this board would have said: He makes out a prima facie case. There is a lawyer on the board. What we will do is do what he could do, ask for a personal appearance hearing. We will call him in and then, by quizzing him, find out if there is some place where his scruples stop and that he could, without violating his conscience, wear a uniform, and do some type of non-combatant work. And then when the board summarized that hearing, there would be in the files a basis to support it. There is no basis here.

The Court: Is there anything in the Christian teachings—this registrant is a Christian—is there anything in Christian teaching that you know of, that is, Christian teaching as taught by Christ and the Disciples, which tells anyone [71] not to associate with sinners?

Mr. Tietz: I do not want to appear to evade the court's question, but I take this flat position: Even if the New Testament was universally understood to mean, to just use one illustration of what I understand the Catholic position is, that there is such a thing as a just war, I suppose every Christian——

The Court: Just leave that "war" out of it.

This is non-combatant service. A man is not participating in the acts of war.

Mr. Tietz: I have discussed these matters with many conscientious objectors, and particularly among a pacifist class of conscientious objectors, and I have found that they give many reasons which were entirely satisfactory to them and to very learned ministers, and they go like these. They quote the scriptures. I quoted on, Second Corinthians:

"I shall not be united with unbelievers."

Another one: "Ye shall not take oaths." The fact it is a practice, and the fact that in the Army a man must take an oath—he cannot do like a defendant would do here if he was called to the stand, his will affirm.

In other words, there are scriptural bases which, to the court and me, might not seem substantial enough to bar the court or me from engaging in such an enterprise.

The Court: I am not attempting to pass upon that, Mr. [72] Tietz, or upon the conscientious objections of any person. The board here has that problem.

My question is directed to this: In human experience a Christian who would say he is conscientiously opposed to having any contact with sinners would be the exception rather than the rule, wouldn't he?

Mr. Tietz: Oh, yes. I would say just roughly——

The Court: So the board, acting as it did, they say in effect: We believe this young man is con-

scientious in his opposition to participating in war, but they do not believe that his conscientious scruples carry him to the point where his is conscientiously opposed to participation in non-combatant service.

Now, it might have been easier, it might have been even a sounder basis to reach the contrary result. In other words, there might be a better argument, if you please, to put him in the classification I-O than I-A-O, but that is not even our problem, is it? Our problem is whether there is any rational basis, whether it is within the bounds of reason on this record to put him in I-A-O.

Mr. Tietz: Not so much rational basis. I would differ with the court.

The Court: Rational basis in fact, yes. And I take it that they proceed from some premise of fact, and that is a very broad statement to make, isn't it? [73]

Mr. Tietz: There is no question, and the board felt, the board unquestionably felt that this young man could be placed in I-A-O without violating his scruples. They felt that way. But they must have—I keep repeating myself—a basis of fact for it. And if Mr. Real can point out where there is a basis of fact, then I will concede it.

Let me give an illustration of an actual case, a case up now in the Supreme Court for other reasons. This case is reported in the last advance sheet of the Federal. It is the Head case that I argued before the Tenth Circuit, and I argued that there was no basis of fact. In that case the United

States Attorney, neither in the trial court nor in the Court of Appeals, could present to the court a basis of fact, but the learned Chief Judge Phillips who was assigned to write the opinion went through the file and he came up—now, that is the next point and I am in a very difficult position to try to show now that something in that file is not true. He came up with what was the basis of fact, and by relating it to the court the court will see what I mean about a basis of fact.

In the special form 150 the defendant, answering the question: "On whom do you rely for your religious guidance?" instead of saying "Jesus" or "the Bible" or whatever this defendant did, he claimed a man, a certain minister of his fellowship. The FBI in their investigation—because [74] that defendant had the appellate procedure—the FBI interviewed him and then the FBI agent made an honest, very natural misstatement of that man's position, quoted him as saying: "Yes, I would help a wounded soldier. Yes, I would care for the wounded." And the FBI man, in my opinion, wholly honestly, not conceiving that an individual willing to do that on a battlefield would balk at wearing a uniform—to the FBI man that was of no consequence—said he teaches the I-A-O position. Therefore Judge Phillips said that he relied on that man for his guidance and that man teaches the I-A-O position, and therefore this is a basis of fact, and that is so ruled on this opinion which has just come up.

I am taking it from other points. I have affidavits

it was not so and other points in the case. But if Mr. Real can point out something like that in this case, not merely say that the board has a right—it has, but it has to base it on a fact. It cannot make it on a whim; it cannot make it on a fine-spun philosophical reason that people cannot interpret the Bible this way. If there is some basis of fact, one iota, one scintilla of fact, then my whole argument will fall, but I say there is not.

The Court: These must be very difficult questions for any draft board or any other group of people to pass upon—questions of conscience.

As I view it, there is not necessarily any disbelief [75] that this record shows of the defendant in the finding of the draft board. They might have felt that this did not disclose an understanding of what non-combatant service is. This is a difficult chore. I think most of us can be glad we do not have it. We would not want the chore of compelling any man to violate the deep-seated dictates of his conscience.

I have no doubt the officials who were charged with the enforcement of this law believe as I do, that a man's conscience is the oracle of God. They do not want to compel him to do anything that would disregard that oracle. I am confident Congress did not wish to in enacting the law.

Someone must make findings of fact on these matters. The Supreme Court has said that when those findings are made by the proper officials they are like other findings of fact under our system of

justice if there is a reasonable basis for them, even though reasonable men might differ. If the fact found is within the bounds of reason, the known facts upon the record and upon the evidence, then it is not for this court or any court to substitute its judgment for the judgment of the board, the law having imposed upon the board the duty of making that finding. If its finding is within the bounds of reason, it must be sustained.

I am under the duty of sustaining the finding of the local board. The defendant is found guilty as charged.

Mr. Tietz: But, your Honor, I have not rested. I [76] am merely arguing a motion to acquit.

The Court: I am sorry. The motion for judgment of acquittal is denied.

Mr. Tietz: I will call the defendant.

The Clerk: Any objection to swearing?

The Defendant: Yes.

ROBERT DONALD ROWLAND

the defendant herein, called as a witness in his own behalf, having duly affirmed to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Robert Donald Rowland.

Direct Examination

By Mr. Tietz:

Q. What church do you belong to?

A. The Church of Christ.

(Testimony of Robert Donald Rowland)

Q. When did you join the Church of Christ?

A. I was baptized May the 8th, 1948.

Q. Do you mean that by baptism you performed the act of joining or that is a formal entrance?

A. Yes, that is when I was added to the church.

Q. How long have you been a member? How long have you been associated with the Church of Christ?

A. I have attended the Church of Christ all my life. [77]

Q. Now, page 11 of the exhibit (2) shows that on November 21, 1950, four days after the board apparently met and classified you I-A-O, Form 110, which is a postcard, was sent to you. Do you remember getting a notice or postcard telling you what classification was given you? A. Yes.

Q. What did you do when you got it?

A. Cut it down and put it in my wallet.

Q. You did what?

A. I cut it down and put it in my wallet.

Q. You mean there was a portion of that postcard that had a dotted line with instructions to cut it out and put it in your wallet and carry it with you, is that it? What else did you do? Did you notice what classification was on it?

A. Yes.

Q. What was it? A. "I-A-O."

Q. Is that what you asked for?

A. No.

Q. Did you do anything about it?

A. Yes, I went over to the draft board.

(Testimony of Robert Donald Rowland)

Q. What did you do there?

Mr. Real: If it please the court, I will object to this line of questioning as irrelevant and immaterial to this particular proceeding; that under the Cox case the only [78] question here is as to whether he received a notice of induction and as to whether he refused to submit pursuant to that notice of induction. That is the only question before this court, your Honor. So far as any classification and the legality of that notice of induction, it is a question of law for your Honor to decide from the records.

Mr. Tietz: Might I be heard briefly, your Honor?

The Court: Do you offer it as relevant to the issue of specific intent?

Mr. Tietz: No, your Honor. We offer it on this basis: That we are laying a groundwork for a denial of due process, and under a long line of cases, including court of appeals decisions after the Cox case, it is recognized that, as I put it before, although the board can be wrong in its judgment, it cannot be illegal in its acts, so that if I can show a denial of due process, even though there may be a basis of fact—and that is what a number of the recent cases have said—even though there is a basis of fact, if there is a denial of due process, it is the right of every citizen to show that it is still there.

The Court: If that is the purpose, the objection is overruled. You may answer.

(Testimony of Robert Donald Rowland)

Mr. Tietz: May the reporter read the question, please?

(Last portion of record read by the reporter.)

A. I talked to the clerk. [79]

Q. And what was the conversation?

A. Well, I asked the clerk concerning the classification. I said that was not the classification that I filed for, that I deserved. She told me that inasmuch as the draft board had classified me that, that they would not change their decision.

Q. When you went down there you went for what purpose?

A. To see about having the classification changed.

Q. And did you notice on the postcard, in very fine print, what the printers call six-point type——

Mr. Real: I will object, your Honor, on the grounds that this is leading the witness.

The Court. Overruled.

Q. (By Mr. Tietz): ——that on this postcard in the smallest type there, in what the printers call six-point type, there was something about personal appearance or something about appeal? Did you have a personal appearance?

A. I considered that a personal appearance.

Q. What did you consider as a personal appearance? A. When I appeared at the board.

Q. I see. Did you speak to her about an appeal?

A. Yes.

Q. What was the conversation on that?

(Testimony of Robert Donald Rowland)

A. Well, as I already said before, she said as I had already been classified in I-A-O, that the board wouldn't [80] change their decision.

Q. Did you ask her if there was anything you could do to get them to change the decision?

A. Yes.

Q. And what did she say?

A. She said there wasn't.

Mr. Tietz: You may cross-examine.

Cross-Examination

By Mr. Real:

Q. Mr. Rowland, how much schooling have you had?

A. I went to junior college about two and one-half years after getting out of high school.

Q. You had average grades in junior college, is that correct? A. Yes, about average.

Q. Average or better than average?

A. About average.

Q. And you read and write the English language adequately; you consider yourself——

A. Well, enough for my own purposes.

Q. For your own purposes. You said, Mr. Rowland, that you read the notice of classification that you were sent by the local board, is that correct?

A. Yes, after I cut it down and put it in my wallet.

Q. Did you read the whole card? [81]

A. Yes.

(Testimony of Robert Donald Rowland)

O. And the notice of the right to appeal?

A. Yes.

Q. And in that notice—did you read it very carefully? This is very important to you, isn't it, this decision as to what the local board made?

A. Yes.

Q. So that you were to avail yourself of everything that the local board was supposed to give you, is that correct? A. That is right.

Q. On that card did you notice it says: "Appeal from classification by the local board must be made within 10 days after the mailing of this card by filing a written notice of appeal with the local board"? Did you read that? A. No.

Q. Did you tell me you read this notice of appeal? A. Yes.

Q. Did you read that within the same 10-day period you may file a written request for personal appearance? A. No.

Q. But you read this notice? A. Yes.

Q. "If this is done, the time in which you may appeal is extended 10 days from the date of mailing the new notice of classification after such personal appearance." Did you [82] read that?

A. I got the classification. It is something like two years ago and I don't remember what was on it, word for word.

Mr. Real: May it please the court, if the clerk may mark Selective Service form 110 as Government's 3 for identification.

The Court: It may be so marked.

(Testimony of Robert Donald Rowland)

The Clerk: Government's Exhibit 3 for identification.

Q. (By Mr. Real): I place before you Government's Exhibit 3 for identification, Mr. Rowland, and ask you to read that. Now, I will ask you is Government's Exhibit 3 for identification the exact copy of the Notice of Classification, without your classification or your name and serial number? In other words, that is the notice that you received, the same type of notice?

A. It stated the same general things on it.

Q. The same general things?

A. I don't know that it was an exact copy.

Mr. Real: Can it be stipulated, your Honor, that this Form 110 is the same type copy that was sent?

Mr. Tietz: The defendant will stipulate that it is so similar that there is no material difference in whatever you have there. I have not seen it. I have seen only one, but they are so similar that there is no material difference.

The Court: Please show the exhibit to [83] counsel Mr. Real, always show the exhibits to counsel before you show them to the witness.

Mr. Real: I am sorry, your Honor.

Q. Mr. Rowland, when you received that card you were apprised at that time that you were entitled to a personal appearance before the local board and then, as I say, if it denied any of your claims at that time, that you were entitled to an appeal, is that correct?

A. I didn't understand the question.

(Testimony of Robert Donald Rowland)

Q. I say, when you received the notice, Form 110, Government's 3 for identification, you knew at that time that you were entitled to a personal appearance before the local board and that if the local board refused the classification which you wished, that you were entitled to an appeal, is that correct?

A. I knew about a personal appearance, yes.

Q. You found out from that card, is that correct? A. No.

Q. How did you find out?

A. I knew it before.

Q. And what did you consider a personal appearance before the local board?

A. When I appeared at the board.

Q. And did you submit anything in writing to the local board concerning your personal appearance or an appeal [84] therefrom? A. No.

Mr. Real: Thank you.

Mr. Tietz: There is just one question, your Honor.

Redirect Examination

**By Mr. Tietz:**

Q. Do you recall about when you went down to the local board and had this conversation with the clerk? A. It was within a few days.

Q. That is all—a few days after you received that notice of classification? A. Yes, sir.

Mr. Tietz: That is all.

The Court: How long?

Mr. Tietz: I beg pardon?

(Testimony of Robert Donald Rowland)

The Court: How long after you had registered was it that you went down to the local board to make that appearance?

The Witness: I don't remember. It was shortly after I got this card, within a week or so.

The Court: When did you receive the card, about?

The Witness: Just a minute. I got it (witness producing wallet)—it was mailed November 21, 1950. I imagine I received it a day or two after that.

The Court: You had been registered over a year at that time, had you not, under the Selective Service System? [85]

The Witness: I registered November 4, 1949.

The Court: That would make it a little over a year?

The Witness: Yes.

The Court: I want to be sure I understand you. Is it your testimony that all during this time when you were a registrant, up to the time you went down to make a personal appearance before the board, that you did not know anything about a registrant's right to appeal a classification?

The Witness: I knew that I had the right to a personal appearance before the board. I considered that was an appeal.

The Court: Did you read this "Special Form for Conscientious Objector" prior to the time you filed it on November 6, 1950?

The Witness: Which form is that?

The Court: Please place before the witness, Mr.

(Testimony of Robert Donald Rowland)
Clerk, Exhibit 2 opened to page marked 12. Toward the center of the page is some printed matter. Did you read that at the time you filled in the form?

The Witness: Where it says "Instructions," yes, I read it.

The Court: Read it right now, will you?

The Witness: To myself or out loud?

The Court: Read it out loud.

The Witness: "A registrant who claims to be a conscientious objector shall offer information [86] in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form No. 100).

"The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

"In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations."

The Court: Did you read that last sentence which you last read there at the time you filled in that form?

The Witness: Yes.

The Court: Didn't that convey to you that there

(Testimony of Robert Donald Rowland.)

was a right of appeal from an adverse ruling on your claim?

The Witness: Yes. I considered my appearance at the draft board as an appeal.

The Court: Anything further?

Mr. Tietz: I have some other witnesses, your Honor. [87] Will you step down, Donald?

The Court: You may call your next witness.

Mr. Tietz: The defendant will call Rev. Page.

Mr. Real: If it please the court, before we go into this may Maj. Keeley be excused now as a witness in this case, your Honor?

Mr. Tietz: We have no objection.

The Court: Very well, you may be excused.

ELWOOD A. PAGE

called as a witness by the defendant, having affirmed to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Elwood A. Page.

Direct Examination

By Mr. Tietz:

Q. Mr. Page, I am going to place before you a portion of the exhibit entitled—one sheet, but it is entitled pages 49 and 50, which apparently is a card, the front and the back side, a double card.

The Court: You refer to pages 49 and 50 which are one sheet?

Mr. Tietz: Yes, your Honor.

(Testimony of Elwood A. Page.)

The Court: Of Exhibit 2?

Mr. Tietz: Yes, your Honor [88]

Q. Will you tell us if you are the minister of the defendant's congregation? A. I am not.

Q. Are you an old friend of the family, of his grandmother? A. Yes.

Q. Is that the reason for you coming to the local board and endeavoring to help this young man?

A. That is true.

Q. Is it a fact that you belong to a different fellowship of the Church of Christ than he does?

Mr. Real: May it please the court, I will object to this line of questioning. I see no relevancy to to the issues in this case.

Mr. Tietz: That is an exhibit——

The Court: Overruled.

Mr. Tietz: ——and I wish to have the record show how Rev. Page came into the picture and that he is not the minister of this defendant, and that this defendant is not bound by what may be on that card.

The Court: I think the objection is well taken but I will overrule it. He may explain the exhibit.

Mr. Tietz: That is my sole purpose from this witness.

The Witness: I would like to explain the situation as such. Each congregation of the Church of Christ is a [89] sovereignty of its own, and as to considering the phraseology of "fellowship" I am not the minister of the congregation or the group that meets that this boy is a member of under the

(Testimony of Elwood A. Page.)

eldership there. Each congregation is a sovereignty of its own, ruled by the eldership of the congregation.

Q. Am I right in believing that there are a half a dozen divisions of the Church of Christ, each numbering hundreds of congregation, and that the division or fellowship—whichever term you prefer using—that you belong to has different attitudes toward a number of things such as baptism and towards Sunday Schools and so on than the fellowship that this defendant belongs to?

A. On doctrinal points there are some phases of difference; yes, sir.

Q. And your card evidences some of those differences that his fellowship does not; I believe the card mentioned Sunday Schools and a number of things such as that? A. That is true.

Mr. Tietz: That is all, thank you. You may cross-examine.

The Court: Any questions?

Mr. Real: No cross-examination.

The Court: You may step down, Mr. Page.

Mr. Tietz: Mr. Dallas Stone, please. [90]

DALLAS E. STONE

called as a witness by the defendant, having first affirmed to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Dallas E. Stone.

(Testimony of Dallas E. Stone.)

Direct Examination

By Mr. Tietz:

Q. Mr. Stone, you are acquainted with the defendant? A. I am.

Q. For how long have you known him?

A. Oh, I don't know just how old he is, but since he has been about a year and a half old, I believe.

Q. Do you occupy any position, have any title in the Church of Christ congregation of which he is a member?

A. Yes, I am called the leader there.

Mr. Real: I renew my objections at this time, your Honor, as to this witness. It is irrelevant to any point in this case.

The Court: No pending question, Mr. Real.

Q. (By Mr. Tietz): Because of the fact you have known him since he was an infant and any other facts that you may wish to give us, have you the means of knowing his reputation among his associates for truthfulness?

A. Yes, I know his reputation very well, [91] being associated with him since he was just a baby, you might say. He has always had a reputation of being honest, sincere and upright, and I have never known him into any mischief of any kind.

Q. How often have you seen him during the last 18 or 19 years?

A. Well, I would see him once a week and then perhaps once during the middle of the week. For

(Testimony of Dallas E. Stone.)

instance, every Sunday, and then in between times once or twice a week.

Q. And you know his associates and his friends? A. Yes, sir.

Mr. Tietz: Thank you very much. You may cross-examine.

Mr. Real: No cross-examination, your Honor.

The Court: You may step down.

Mr. Tietz: Mr. John Sharp, please.

JOHN H. SHARP

called as a witness by the defendant, having first affirmed to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: John H. Sharp.

Direct Examination

By Mr. Tietz:

Q. Do you occupy a position in the congregation of which this defendant is a member?

A. Yes, sir. [92]

Q. And has it a name or a title?

A. I am one of the leaders. In addition to that, why, I am secretary-treasurer of the congregation.

Q. How long have you known this defendant?

A. I have known him for better than 19 years.

Q. How well have you been able to get acquainted with him?

A. Well, I have been regularly associated with

(Testimony of John H. Sharp.)

him and his family ever since that time. The greater part of the time we have lived within one block of each other, and my association has been close and constant.

Q. Do you have the means of knowing his reputation for truthfulness? A. Yes, sir.

Q. What is his reputation?

A. His reputation, so far as I know, is perfect.

Q. Well, if it was otherwise, would you know?

A. I believe I would.

Mr. Tietz: That is all.

Mr. Real: No cross-examination, your Honor.

The Court: You may step down, Mr. Sharp.

Mr. Tietz: Step down, please. Mr. Ervin Waters.

J. ERVIN WATERS

called as a witness by the defendant, having first affirmed to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows: [93]

The Clerk: Please state your name.

The Witness: J. Ervin Waters.

Direct Examination

By Mr. Tietz:

Q. Do you hold any particular position in the Church of Christ?

A. I am an evangelist of the Church of Christ.

Q. Are you an evangelist in the division of which this defendant is a member?

(Testimony of J. Ervin Waters.)

A. Yes, sir.

Q. Am I correct in referring to it as a "peace division"? A. Yes.

Q. What distinguishes it from the other divisions of the Church of Christ with respect to pacifism?

Mr. Real: Your Honor, I will object to the answer to this question as irrelevant to the issues in this case.

Mr. Tietz: I must concede that probably it was not too correct a question. L withdraw it.

Q. Do you know this defendant?

A. Yes, sir.

Q. How long have you known him?

A. Almost 14 years.

Q. How well have you had the opportunity to get acquainted with him and his associates?

A. During those 14 years sometimes [94] rather constantly and at others intermittently. I have been associated with him in church work and activities. I fact, a few years ago Montebello was my headquarters and the Los Angeles area was also for several years, and I have held a few meetings at the Church at Montebello, likewise at adjacent congregations or nearby congregations which the defendant has attended, and he has even visited in my home which presently is in Tennessee.

Q. Do you have means of knowing his reputation among his associates for truth and veracity?

A. Yes, sir.

Q. What is that reputation?

(Testimony of J. Ervin Waters.)

A. It is good.

Mr. Tietz: Thank you.

Mr. Real: No cross-examination, your Honor.

Mr. Tietz: We will call Floyd Morrow.

FLOYD W. MORROW, SR.

called as a witness by the defendant, having first affirmed to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Floyd W. Morrow, Sr.

Direct Examination

By Mr. Tietz:

Q. What is your occupation? [95]

A. I am an auto mechanic.

Q. Do you occupy any position in the Church of Christ?

A. I am a member of the Church of Christ.

Q. Do you know this defendant?

A. Yes, sir.

Q. How long have you known him?

A. Well, I knew him—I came here in '32, and if he was that old, I knew him that long, just how old he is. I knew him since 1932 or '33, since he was a child.

Q. Have you had the opportunity to get well acquainted with him? A. Oh, yes.

Q. How often have you seen him in the last few years? A. Often.

(Testimony of Floyd W. Morrow, Sr.)

Q. Well, when you say "often" do you mean, perhaps, once a week or what?

A. Well, sometimes oftener than that, sometimes maybe several weeks apart.

Q. Do you believe you have the means of knowing his reputation among his associates for truthfulness? A. I do.

Q. What is that reputation?

A. I don't know how it could be any better.

Mr. Tietz: Thank you. You may cross-examine.

Mr. Real: No cross-examination, your [96] Honor.

The Court: You may step down, Mr. Morrow.

Mr. Tietz: Our last witness, your Honor, will be Mr. Carl Hildebrand.

Mr. Real: In the interests of saving time, if this witness will testify to the truth and veracity of this defendant, we will stipulate that this witness will testify that his reputation for truth and veracity is good.

Mr. Tietz: We will accept that stipulation. Thank you very much, Mr. Hildebrand.

The defendant rests, your Honor. And we have a motion on another ground that will require a little argument.

The Court: Any rebuttal? Does the Government rest?

Mr. Real: The Government rests, your Honor.

The Court: Both sides rest. You wish to renew your motion for a judgment of acquittal?

Mr. Tietz: The defendant wishes to renew the motion that was made at the close of the Govern-

ment's case on the two separate points stated, and the defendant wishes to add to those two points a third point and would like to argue it. Possibly the court, after hearing the nature of the argument, might even want the matter briefed.

The nature of my argument is this: That this defendant was frustrated from securing a right given to every registrant, namely, an appeal; and that the intent of Congress that every registrant claiming to be a conscientious objector to any [97] form of participation in warfare should be determined. [98]

* * *

Mr. Real: Yes, your Honor. Does your Honor wish to rule on the motion now before the court for a judgment of [118] acquittal, your Honor?

The Court: Yes. The motion for a judgment of acquittal will be denied. [119]

The Court: The case is here for further trial. The evidence is still open, I take it?

Mr. Tietz: Yes, sir. We would have no objection whatever to the Government rebutting what the witness has testified to.

The Court: This defendant now rests?

Mr. Tietz: Yes, sir. We have no more testimony.

Mr. Real: No rebuttal testimony by the Government, your Honor.

The Court: Both sides rest?

Mr. Real: Both sides rest.

The Court: Any argument? [128]

* * *

Anything further?

Mr. Tietz: No, your Honor.

The Court: Very well, the defendant is found guilty as charged. [145]

* * *

The Court: Let the defendant come to the bar.

(Argument for mitigation of sentence omitted from transcript by request of counsel.)

The Court: Does the Government have anything?

Mr. Real: The Government's recommendation is for a penitentiary type of sentence, your Honor.

The Court: Do you have anything to say, Mr. Rowland?

Mr. Tietz: Might I have a word? Does the Government mean by "penitentiary type" a prison type sentence?

The Court: The Director of Prisons has the authority under the law to place any prisoner wherever he thinks he should be.

Mr. Tietz: But I do hope that when this young man is eligible for parole there won't be any feeling that his is an aggravated case, and I would like an expression that the United States Attorney feels that.

Mr. Real: There will be no feeling of that. Our recommendation of a penitentiary type sentence is a recommendation for sentence wherever the Attorney General feels that this man can best be used.

The Court: Anything further?

Mr. Tietz: Nothing, your Honor. [162]

The Court: Do you have anything you want to say, Mr. Rowland?

The Defendant: There is no need to waste words.

The Court: Pardon?

The Defendant: There is no need to waste words.

The Court: It might not be a waste of words. It is your opportunity to say what you want to say. You follow the dictates of your conscience and your conscience is clear, and you know the peace that goes with a person who works with a clear conscience.

The Defendant: I would like to ask what you think religious training and belief is. All of my life I have been taught about this, ever since I can remember, and I see no reason that you could say that I haven't been, and to say that you see anything in the file that says that I don't believe this.

The Court: I did not suggest that, Mr. Rowland.

The Defendant: That was my understanding of what you said.

The Court: If you got that impression, it is an erroneous impression. The file contains a clear statement of your belief and your local board apparently must have been convinced of the honesty and sincerity of your conscientious objection or you would not have been classified in 1-A-O. But, to have that classification, to my mind is a long way

from having a 1-O classification which is based upon religious [163] training and belief.

I do not know whether you follow the teachings of Christ or not. I assume you do.

The Defendant: I am a member of the Church of Christ.

The Court: And I did not know that Christ had ever taught and preached that a Christian would contaminate himself by coming into contact with unbelievers and sinners. In fact I always understood it contrary.

But that is not my province. That is for the local board and the appeal board of the Selective Service System. It may be General Hershey's duty at the top to do something about it. If he feels that the classification is wrong, it is the State Director's duty to do something about it, the appeal board, the local board, and your case has had the attention of the State Director and, I believe, the National Director.

Isn't that true, Mr. Tietz?

Mr. Tietz: They left it up to the court. They said the court is better able to judge.

The Court: You brought it to their attention?

Mr. Tietz: Oh, yes, yes.

The Court: It is not the court's function to classify. It is only the court's function to say whether or not there is any reasonable and rational basis for the classification given you by the draft board, and clearly there is. [164]

Anything further?

One of the great difficulties is that Congress does not go as far in granting exemptions as some people apparently do in claiming conscientious objections. But that has been true in all ages, hasn't it, in all history, that people with more sensitive consciences often suffer because the majority do not understand the extent of their conscientious convictions? And the Government, being accommodated not to either extreme, sometimes does not accommodate, or the law does not amply accommodate the extremely sensitive conscience, and it is those who have suffered throughout history.

Anything further? Do you have anything further, Mr. Rowland?

The Defendant: Nothing of any importance.

The Court: It is your time to say anything you wish to say.

The Defendant: I would like to say that I feel that the court is prejudiced against me and against any conscientious objector. It has been evident in this trial and I have seen other trials, and I feel that you are prejudiced.

That is all I have to say.

The Court: Mr. Rowland, I will treat you just the way I have treated all the others. I do not say this in reply to what you have just said. You are entitled to your opinion, of course. I merely say that for the comfort it might be [165] to you, that you can go back to 1946, when I first embarked upon having the unpleasant duty to sentence people such as you, and I think you will find that, even

though I am in error in your opinion, I have been consistently in error.

Anything further? Are you ready for sentence?

The Defendant: Yes.

The Court: It is the judgment of the court, Robert Donald Rowland, that you be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of four years for the offense charged in the indictment.

You are now committed to the custody of the Marshal to serve that sentence and your bail is exonerated.

[The omitted portions of The Reporter's Transcript consisted of argument of counsel.] [166]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 25th day of March, A.D. 1953.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed April 7, 1953.

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 16, inclusive, contain the original Indictment; Motion to Dismiss; Order Denying Motion to Dismiss; Waiver of Trial by Jury and of Special Findings of Fact; Motion in Arrest of Judgment; Motion for New Trail; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of Minutes of the Court for October 27, 1952, February 9, 1953, and March 2, 1953, which, together with the original exhibits and Reporter's Transcript of Proceedings on October 27, 1952, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 9 day of April, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk,

/s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13800. United States Court of Appeals for the Ninth Circuit. Robert Donald Rowland, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed April 10, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals
for the Ninth Circuit

No. 13800

ROBERT DONALD ROWLAND,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The District Court erred in not holding that the I-A-O classification was without a basis of fact

and that the failure to classify the registrant I-O was arbitrary.

II.

The District Court erred in not holding that the indictment was fatally defective.

III.

The District Court erred in not holding that the appellant had been frustrated in his desire to secure an administrative personal appearance and appeal.

/s/ J. B. TIETZ,

Attorney for Appellant.

[Endorsed]: Filed April 10, 1953.

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[Title of Court of Appeals and Cause.]

ADOPTION OF DESIGNATION

Appellant hereby adopts the Designation of Record heretofore filed in the District Court.

/s/ J. B. TIETZ.

[Endorsed]: Filed April 10, 1953.

[Title of Court of Appeals and Cause.]

## STIPULATION AMENDING ADOPTION OF DESIGNATION

It is hereby stipulated that the Adoption of Designation of Record, heretofore filed, may be amended to read that only the following portions of Reporter's Transcript are material to a proper consideration of the appeal:

* * *

The record is to show that omitted portions of the Reporter's Transcript consisted of argument of counsel.

Dated: April 24, 1953

/s/ J. B. TIETZ,
Attorney for Appellant.

WALTER S. BINNS,
United States Attorney,

By /s/ MANUEL L. REAL,
Asst. United States Attorney.

[Endorsed]: Filed April 27, 1953.